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Docket No. 95-2063

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Tenna Phipps Lang, *Petitioner*,

v.

O. Fayrell Furr, Jr., *Respondent*.

On Petition for a Writ of Certiorari to the South Carolina Court of Appeal

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REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

I. Whether Petitioner's equal protection rights were violated in a state court, by court actions in a legal malpractice action by court rulings which excluded reference, by her expert witness to specific ethical canons or ethical rules for the jury to use as a benchmark by which to gauge the performance of an attorney -- leaving the jury only guesswork. Jurors are rarely equipped to weigh the value of expert testimony.

II. Whether South Carolina lacks a definitive standard of care relating to an attorney's communicating an offer of settlement to a client in a civil case and, if so, whether that served to deny Petitioner equal protection of the laws.

III. Whether Petitioner's participation in juror selection must be considered a fundamental right, and whether factual issues in dispute must go to the jury.

IV. Whether Petitioner can be held to an untenable standard when her equal protection rights were violated by the granting of a directed verdict to Respondent on the issue that he failed to allow Petitioner to participate in jury selection and that he selected a hostile neighbor, Spivey, who served as foreman, over her objection. State Court of Appeals erroneously ruled she could not prove if Spivey had not been on the jury that she would have won. Yet, Appellate court judges agreed at oral argument there is no way to prove that. Factual issues in dispute must go to jury.

V. Whether Petitioner, as a Pro se litigant, has been denied equal protection of the law through the misapplication of South Carolina Rules of Civil Procedure and through erroneous actions of the Appellate Court of South Carolina

using res judicata/collateral estoppel to grant Respondent's directed verdict motion on his negligence for failing to move for a directed verdict during the trial to preserve Petitioner's rights on appeal. Rule 50 SCRCP.

VI. Whether Petitioner was denied her Constitutional Right to a "fair" trial by Respondent's calling of the trial judge (in the underlying case) by surprise, to testify, even after he was continually unavailable for deposition by Petitioner under color of being judicially "busy," thus denying Petitioner's right to deposition testimony required for discovery and to prepare questions for cross examination at trial. SCRCP

VII. Whether the South Carolina Court of Appeals denied Petitioner due process and equal protection of the laws in refusing to address her arguments; contributory negligence, assumption of the risk, and res judicata/collateral estoppel where no evidence had been presented at trial to support the jury charge and where the jury charges were simply not available.

VIII. Whether the Petitioner was denied her Constitutional Right when the trial judge charged the jury that they could not be concerned about what they may think the law should be but, for this case, only with what he charged the law to be.

TABLE OF CONTENTS

Page

Questions Presented. i

Table of Contents. iii

Table of Citations. iv

Statement of the Case. 1

Reason for Granting the Writ. 8

I. It's a federal question of **constitutional rights to due process and equal protection of the laws**. 8

II. Petitioner's claims present a colorable issue because when parties act **under color of state law, custom, or usage** as misapplying legally enacted Rules of Civil procedure it's the same as if they acted under a defective statue.. 9

III. This case is especially right for court intervention because **the Standard, the Rules, and the Law** has been **misapprehended and grossly misapplied**. 9

Conclusion

TABLE OF CITATIONS

Cases Cited:

Alston v Blue Ridge Trading Co.,
108 S.C. 292 (S.C. 1992). 3

Bell v Boyd, 252 SC 289, 166 SE2d 104 (1969). 7

Beverly Beach Properties, Inc. v Nelson,
(Fla) 68 So. 2d 604, 41 ALR 2d 1071 7

Chambers v Mississippi, 410 U.S. 284, 290-91
n.3 (1973). 8

Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311 (1981). 10

Een v Consolidated Freightways, 220 F. 2d 82 6

Florida v Rodriguez, 469 U.S. 1, 12 (1984). 10

Garrett et al, v Snedigar et al,
359 SE 2d 283 (SC CA 1987) 3

In re Guardianship of DiCarlo
3 Cal 2d 225, 44 P2d 562, 99 ALR 990. 7

McGaffey v Sudowitz, (th Dist) 189 Cal App 2d 215,. 7
1'0 Cal Rptr 862.

New York Transit Authority v Beazer,
440 U. S. 568, 571 (1979). 10

Perma Life Mufflers v International Parts Corp.,
392 U.S. 134, 136 (1968). 10

Smith v Pinner, 68 Ariz 115, 201 P2d 562, 99 ALR 990. . 7
(overld in part on other grounds by Marchall v Superior
Court of Maricopa County, 131 Ariz 379, 641 P2d 867

Walton v State, (Tex App Houston (14th Dis) SW 2d 488.. 7

Williams v Lee, 358 U.S. 217, 218 (1959) 10

United States Constitution Cited:

Constitution Amendment VII, U.S.C.A. Const. Ament 7. . 6

Constitution Fourteenth Amendment claim. 9

Rules Cited:

Federal Rule Civil Procedure Rule 50 (a,b,) 28 U.S.C.A.. . 6

South Carolina Rule Civil Procedure Rule 50. 7,9

Supreme Court Rule 4.17. 10

Supreme Court Rule 3.2. 8

Other Authorities Cited:

Judge Posner, US Court of Appeals 7th Circuit. 5

Am Jur 2d. 7

C.J.S.. 7

STATEMENT OF THE CASE

Arguments in Respondent's Brief are meaningless and non-responsive to the case of *Lang v Furr,* because independent arguments irrelevant to the matter can not be used as the basis for determing the proper application of law in this case.

Lady International Fitness Center had undisputedly mis-assembled the exercise equipment which injured Plaintiff by disregarding the manufacturer's directions.

Respondent takes comfort from the Court Opinion[1] implying Plaintiff "caused" the exercise bar to come loose from it's assembly. No such thing as "releasing and causing *anything* to happen"provoked the accident.Spa testimony confirmed this claim and after the accident, the spa added a remedial extension chain and closed "S" hook. The "Spa" testified they had no maintenance man and that they had repeatedly warned that the equipment was dangerous. Cables wore out prematurely before breaking.When Petitioner testified she was "unsure"what happened; she was testifying regarding whether the cable broke, or the part attached to its cable had broke and later, during discovery, learned about the "S" hook,and whether the "S" hook had broken.

Contrary to Respondent's assertion, that "there was specific evidence from which a jury could have concluded that she recklessly disregarded the instructions...," the fact is, except through innuendo and exaggeration Respondent has not and cannot cite any specific testimony to that effect.

Spa personnel gave beneficial testimony in hindsight furnished to protect their jobs, only showing that they intended to give the orientation, and this was something they normally did,[2] but no sworn witness ever said Lang was "trained"on a given date. Spa personnel testified that during such "orientation," instruction not

[1] Opinions of the court of appeals in the malpractice and in the personal injury case are attached to the Petition as Appendices A and B, respectively. References in this brief will be made to the pages 1a-14a of the Appendices, containing the two opinions.

[2] Karen, Spa assistant mgr, sold Lang her membership and testified that she could not remember giving Lang an orientation. Lang joined the Spa a month prior to the accident. There is no testimony in the record that Lang was given an orientation.

to clang the weights was given only because that wears out the weights by clanging them together and not for safety reasons. This certainly does not prove contributory negligence. A.12-13a

Respondent p. 4, says: "That Furr intentionally directed Lang to the wrong location for jury selection and that Spivey intentionally concealed his antagonism toward Lang and her family have no basis in the evidence." That statement is completely false. Counsel agrees with the highly disputed issues on the jury and juror Spivey but avoids the question of the directed verdict on the disputed fact that, by law, jury must decide. (Petition at 14-21)

Petitioner was indeed denied participation in jury selection and Furr chose an unfriendly neighbor who served as foreman. During *voir dire*, Spivey concealed he knew Plaintiff and that he disliked her son because of his daughter's relationship with the son. Spivey served in 1987 and returned to testify for Furr in the Legal Malpractice case, *Lang v Furr*, in 1993, to protect Furr by "remembering"six years later what he (Spivey) should have said and done during *voir dire* in 1987(R p.4) Is counsel trying to convince the court that this is the standard? Petitioner's expert witness, Seaton, testified at deposition p. 83: **"Based on the facts given to me from the jurors who participated in the deliberations, Mr. Spivey was the leader against Ms. Lang in jury argument, and successfully led that argument to a verdict for the defendant."**[3] The other jurors were interviewed but the judge granted Respondent's motion *in limine* to disallow any reference or statements from the other jurors.

That Furr intentionally mis-directed Lang and that Spivey intentionally concealed his antagonism toward her and her family is supported by the trial transcript and *voir dire*. Nonetheless, the juror and jury issues were highly disputed issues of fact that should have gone to the jury.[4] However, the trial judge granted

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[3]Lang's attorney proffered Seaton's deposition at trial for the record on appeal.

[4]"...In order for a directed verdict to be proper, it not only must be clear that no issue of fact is involved, but the conclusions and inferences to be drawn from the facts must be undisputed as well..." *Garrett et al v Snedigar et al* 359 SE 2d 283 (SC CA 1987). "In determing whether there

Furr's Directed Verdict Motion removing the issue from consideration by the jury in direct conflict with the laws and rules of civil procedure. A litigant's participation in juror selection must be considered a fundamental, personal, constitutional right. And factual issues in dispute must go to the jury. Respondent said p 4-5: "Several purported factual assertions... are completely without evidentiary support." ..espondent's statement is completely false and when a party is convicted of advancing a falsehood, no part of his later assertions can carry much believability. Contrary to his allegations, the consideration and losses in Lang's petition are as follows:

(1) Respondent's own pretrial brief, which said on line 10. "State damages (please total the amount of damages) $7,158,306.00 prepared and signed by Respondent 8-26-1987,"

(2) Respondent's pretrial brief, stating on line 13. "Absolute minimum or maximum amount which attorney can, in good faith, recommend to client in settlement: $5,000,000.00," and

(3) Respondent's Plaintiff's Exhibit ID 15 AH 10-27-87 #913 -- an analysis chart of Lang's losses which was presented to the court during the trial of *Lang v Lady International.*

(4) Respondent's own testimony R p. 635, L. 10-16. "The $750,000.00 in this case I think is great; but if we get a verdict we could get a big one. And that is what I told her."

Q. You didn't make any notes or document that? A. No.

Q. Did you present that offer to her in writing? A. No.

(5) Respondent's witness Economist Wood testimony R.p.396

Q. And it's your recollection the figure was seven hundred and fifty thousand dollars ($750,000.00)? A. Yes, it was.

(6) Plaintiff's Expert Seaton, questioned by Mr. Baker, defense Attorney. Q. My question is: Did Mr. McCutcheon tell you when you talked to him about this case an offer of $500,000 had been communicated to Ms.Lang Attorney before the first pretrial?

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are material issues of fact on a motion for summary judgment, all inferences from facts must be viewed in light most favorable to the party opposing the motion; accordingly, summary judgment is inappropriate if facts are conflicting..." *Alston v Blue Ridge Trading Co.* 108 S.C. 292(S.C.1992)

A. I can't tell you that without -- with absolute clarity. All I know is prior to this case being tried Mr. McCutcheon assured me, in whatever form, that there was sufficiency of time for the Plaintiff and attorney to consider the offer of $500,000. And quote,he said he "had authority up to $900,000 to settle the case.

(7) Judge McGowan testified R.p. 379 l. 15-19: "and I was pushing and urging the lawyers to meet somewhere in between Nine Hundred Thousand and a Million Dollars ($900,000 to $1,000,000), and that's what I felt at that point was something that I continued to urge upon the attorneys as strong as I could."

Petitioner did not have any idea of the purported settlement offers; affirming this, she testified (R.198, L. 14-15) "If the Five Hundred and Fifty Thousand Dollars ($550,000.00) had been offered to me, I would have accepted it." (Petition at 13)

Respondent p.5 is over-reaching when he irrelevantly challenged Lang's injuries. Respondent, himself, convinced the judge *in limine* in *Lang v Furr* to disallow testimony pertaining to Lang's permanent injuries. Seaton's deposition testimony is: Lang was excluded from all proceedings and based on these actions by Furr which tend to show that he had questions about her competency, physical condition, or mental condition, then the ethical cannons mandate that he appoint a Guardian Ad Litem. Question: Furr should have appointed a Guardian Ad Litem? Furr did not want to address that issue. The Respondent did not want to "retry" the personal injury case or make any reference to Lang's "permanently disabled" status. Yet, Lang was declared permanently medically and physically disabled by the Social Security Administration in 1985 as a result of the accident at the Spa which forced her to close her business reducing her income from $100,000 per year to social security disability of $8,220, contrary to Respondent's directed verdict motion P.7 granted *in limine* disallowing any reference by Seaton to specific ethical cannons or rules..[5] Further testimony by Seaton showed the judge

[5]Judge Posner,US Court of Appeals 7th Circuit said: not many judges and even fewer jurors are equipped to weigh the value of expert testimony ... They're entitled to "real science." The

was protecting Furr (Petition 5-10). Seaton testified at deposition p.52 L.8-25. Baker Q. The Complaint contains two causes of action; one for breach of contract, and one for malpractice. In your opinion, are both governed by the standard of care in the breaches that you opine; is there some difference as to which--A. Yes. There is, of course, as you know, statutory violation, which would be negligence, per se. Q. What statutory violations have there been? A. The ECs. Q. Are they statutes in your opinion? A. My opinion, they set a standard for a particular class of persons as attorneys. And the violation of those, in my opinion, would be treated as a statutory violation as negligence, per se, and would give a right to I believe, for the trial judge to charge as to punitive damages, sir.

On p.5: Judge McGowan was unavailable for deposition by Petitioner under color of being judicially"busy." It certainly was surprising that he could leave his courtroom (a special one week assignment) in Marion (fifty miles away), holding up court while he appeared live to testify for Furr. JudgeMcGowan dodged deposition and denied Petitioner's right to deposition testimony required for discovery and necessary to prepare questions for trial. SCRCP. McGowan evaded the question whether Lang was aware of settlement offers yet furnished confusing/misleading testimony to thc jury to protect Furr. Defense attorney testified that he made the offers to Furr and each time Furr left the room, came back in a few minutes, and rejected the offer. He assumed, not "knew," that Furr had communicated the offers to Plaintiff.

On p.6, says: "Furr... made decision on spur of the moment not to move for a directed verdict because he felt that Lang was winning the case at that point and he did not want to remind defense counsel to make such a motion...."Only in retrospect does he say that. Furr's negligence was a gross failure[6] to preserve

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court-room is not the place for, scientific guesswork, even of the inspired sort. Law lays science, it does not lead it. (1993)

[6] "The requirement of a proper directed verdict motion as foundation for a motion for judgment notwithstanding the verdict is not a mere technicality but serves vitally important interest in the fair conduct of litigation." Federal Rules Civil Proc.Rule 50

Petitioner's rights to argue, on appeal, the heart of her case, negligence and gross negligence by the Spa, it wiped out her position in the appeal of *Lang v Lady International.* At App.11a, *Lang v Lady International,* the Appellate Court said, "The sole issue on appeal is whether there is any evidence in the record which would support a finding of contributory negligence. **WHILE APPELLANT FAILED TO DRAW AN EXCEPTION CHALLENGING THE POSSIBLE FINDING FOR RESPONDENT BASED ON ITS GENERAL DENIAL** (emphasis added) we find there is sufficient evidence in the record." The **Appellate Court opinion above is in direct conflict with the South Carolina Supreme Court's earlier ruling in appeal granting the Spa's motion to dismiss this issue and removing related trial transcript from the record on appeal.**[7] The appeal should have ended at that point. Thereafter, the **Appellate Court had no legitimate jurisdiction or mechanism for ruling.** Its ruling could serve no purpose but to protect Furr should later action be taken against him and judge McGowan. The Court formulated its opinion to forestall Lang's options. The Court of Appeals ruling is directly in conflict with the rules and rulings of this court. (Petition 22-25)

Furr claimed res judicata/collerateral estoppel on Plaintiff's issue of Furr's failure to move for directed verdict in *Lang v Lady International.*[8] Petitioner's pleadings and the judgment in the first lawsuit actually showed res judicata does not apply in the present case, *Lang v Furr*, because the parties in the second lawsuit (for purposes of claims and/or causes of action in the second lawsuit) were neither "identical" to or in "privity" with the parties in the first; because the claims and/or causes of action in prior and

(a,b),28U.S.C.A. Rule 50 Rules of Civil Procedure "...As this is an action of law, we have under the Constitution (Amendment VII), U.S.C.A. Const. Ament 7, no jurisdiction to review or reexamine the facts, but can consider only questions of law.

[7]In the absence of a motion for judgment in favor of defendant, or other similar proceeding challenging the sufficiency of the evidence, no question of law is presented for our consideration..."" *Een v Consolidated Freightways* 220 F. 2d 82.

[8]Rule 50 South Carolina Rules of Civil Procedure.

present lawsuit are not "identical; and because the "precise point" adjudicated in the first lawsuit is not the "same" as the "precise point" of the claims and/or causes of action in the second.[9]

"Absent complete identity of the parties or indisputable privity, res judicata requires that the precise point(s) in the second lawsuit must have been adjudicated in a previous judgment in order to claim a preclusive effect from that judgment".[10] The judgment in the first case *Lang v Lady International* did not address or adjudicate any of the "precise points,"issues, claims, and/or causes of action in the second case *Lang v Furr*. First case was a personal injury, second case -- a legal malpractice.

"... the doctrine of res judicata is to be applied in particular situations as fairness and justice require, and it is not to be applied so rigidly as to defeat the ends of justice[11] or so as to work an injustice.[12]" In addition, Respondent never proved res judicata-collateral estoppel, he simply "claimed,"entitlement to it based on the judgment in *Lang v Lady International*. Respondent argued that it would not have made any difference what Furr didn't do; claiming the court would have still ruled the same but this misses the point. "...Self-serving declarations and opinions of counsel can not be used as the basis for determining the proper application of collateral estoppel."[13] The precise question raised in the second law suit "Furr's negligence in failing to make a directed verdict motion" was not adjucated in the first. Judge

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[9]See *Bell v Boyd*, 252 SC 289, 166 SE2d 104 (1969) " The essential elements of res judicata are identity of the parties, identity of the subject matter, an adjucation, on the merits, in the former suit of the precise question sought to be raised in the second suit."

[10] Am Jur 2d does not stand alone in this regard. C.J.S. said:"In order that this rule [res judicata] may be applied, it must clearly and positively appear, either from the record itself, or by the aid of competent extrinsic evidence that the precise point or question in issue in the second suit was involved and decided in the first."

[11] *Smith v Pinner*, 68 Ariz 115, 201 P2d 741(overld in part on other grounds by *Marchall v Superior Court of Maricopa County*, 131 Ariz 379, 641 P2d 867); *In re Guardianship of DiCarlo* 3 Cal 2d 225, 44 P2d 562, 99 ALR 990, *McGaffey v Sudowitz* (th Dist) 189 Cal App 2d 215, 1`0 Cal Rptr 862.

[12] *Beverly Beach Properties, Inc. v Nelson* (Fla) 68 So 2d 604, 41 ALR2d 1071.

[13]Walton v State,(Tex App Houston (14th Dis) SW2d 488.

McInnis, in *Lang v Furr*, ignored the rules of collateral estoppel, denying Petitioner her constitutional rights to due process and equal protection of the laws, granting Respondent's directed verdict motion in *limine*. The Appellate Court, also ignoring the rules, affirmed this erroneous ruling. (Op. 5a)

Reply to Respondent's reasons for denying the writ

I.

Respondent's argument is incorrect. Respondent says: "this court has no jurisdiction over the claims presented because they were not properly raised in state court."

Petitioner **has** asserted these claims in the State Court of Appeals, her motion for rehearing, and the Petition for a Writ of Certiorari to the South Carolina Supreme Court; "fundamental fairness," constitutional rights, and the proper foundation for this claim has been made in the State court and denied. **It's not a question of a federal law; it is a federal question of constitutional rights to due process and equal protection of the laws.**

This claim is asserted based on cumulative effect of various Court rulings below; it is a question of constitutional rights to due process and equal protection of the laws. Title 28 USC. 3.2 Certiorari Jurisdiction Over State Courts Under1257. The Supreme Court has jurisdiction to review cases in state courts by way of certiorari... (3)"where any title, right, privilege, or immunity is specially set up or claimed under the Constitution... of... the United States."

Until the action was done, Petitioner had no way to know the courts were going to deprive her of her rights. **It's the courts' action, itself, denying due process and equal protection of the law to a citizen and a *Pro se* litigant which is at issue.**

"'Fundamental fairness' of the entire trial, based upon the cumulative effect of various trial court rulings, may properly await the conclusion of the trial." In *Chambers v Mississippi*, 410 U.S. 284, 290-91 n.3 (1973), the Court held that such a Fourteenth Amendment claim "is properly before us," despite the fact that it had first been asserted below in a motion for a new

trial after the trial had concluded. That claim was asserted on the basis of the cumulative effect of several evidentiary rulings during the trial, to which non-constitutional objections had been made. The Court noted that a federal claim could not have been raised and ruled upon prior to the conclusion of the defendant's evidentiary presentation.

Both lawyers and South Carolina courts have far exceeded the bounds of the Rules of Civil Procedure. **Misapplication of the Rules "under color of State law, custom, and usage"** deprived Petitioner of her Constitutional Rights by depriving her of due process and equal protection of the laws. Due process consists of a "fair"opportunity to present a case before a "fair" tribunal. By misapplying and/or abusing those rules, Respondent deprived Petitioner of her right to a "fair" trial and of her Constitutional right to due process, equal protection, and application of the laws. The Rules of Civil Procedure provide explicit guidelines for civil litigation. The respondent and the courts misapplied, violated, and/or abused those Rules so as to deprive Plaintiff of equal protection of the laws.

II

Respondent says: "This court also lacks jurisdiction because none of petitioner's claims present a colorable federal question."

Petitioner's claims do present a colorable issue because when parties act under color of state <u>custom</u> or <u>usage</u> such as in abusing or misapplying legally enacted South Carolina Rules of Civil Procedure, it's the same as if they had acted under a defective statute. This case is especially ripe for court intervention because the rules have been misapprehended and grossly misapplied.

III

Respondent said: "The court should deny the petition, in its discretion..." It's not a question of Federal Law; **it is a question of constitutional rights to due process and equal protection of the laws.** Respondent's claim is irrelevant to this case. Supreme Court Rule 4.17 Erroneousness of decision below:

"...The court's aim, rather, is to resolve the conflicts among the lower courts and to determine questions of importance. But on occasion the Court does accept a case for review for no apparent reason other than error in the lower court decision.[14] *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

In *Williams v Lee*, 358 U.S. 217, 218 (1959), certiorari was granted because of a "doubtful determination" by the court below " of the important question of state power over Indian affairs" and in *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136 (1968), certiorari was granted because "these [erroneous] rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." See also *New York Transit Authority v Beazer, 440 U.S. 568, 571 (1979)* Despite this reluctance to grant certiorari solely to correct an erroneous decision below, the Court does sometimes grant review simply to correct an error committed by a lower court.[15]

There are instances where the Court seemingly grants review. . . to correct an error in a state court's application of settled federal constitutional doctrine. *Florida v Rodriguez*, 469 U.S. 1, 12 (1984), where Justice Stevens in dissent stated review was granted "to undertake de novo review of the factual findings of a state [trial] court" that, in the Court's words, reflected "a misapprehension of the controlling principles of [Fourth Amendment] law."

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[14] Justice Rehnquist, in an address given at the Mercer University School of Law in 1983, states: "[A] grant of certiorari by the Supreme Court to review a decision of a lower court suggest that the case at issue is a genuinely doubtful one. The winning party in the court below has the benefit of a decision by that court on exactly the same issues which will be decided by the Supreme Court. Nonetheless, the most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court." Justice Rehnquist, "Oral Advocacy: A Disappearing Art," 35 Mercer L. Rev. 10125, 1037 (1984).

[15] ... certiorari may be granted "if the Court can be persuaded (1) that the lower court was very likely wrong and (2) that the error will have serious consequences soon." S. Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 619 (1984).

CONCLUSION

Contrary to Respondent's denials, this court has jurisdiction over the questions presented. The questions were raised and argued in the state court,and in The Petition for Writ of Certiorari to the State Supreme Court, which was denied.(These rights were asserted in at least sixteen different instances). These questions present a colorable claim. **Title 28 USC 3.2 Under 1257 (3) Misapplication of the Rules of Civil Procedure "under color of State law, custom, and usage"** depriving Petitioner, a *Pro se* litigant, of her constitutional right to, due process, equal protection, and application of the laws.

This case involves questions which impact the entire Nation. When a litigant's right to jury selection has been denied, and in subsequent legal malpractice case attorney's directed verdict motions were granted and affirmed by Appellate Court, ignoring attorney's negligence and highly disputed issues of fact, the court has usurped jury functions. The right to trial by jury is **"a basic and fundamental feature of Federal Jurisprudence**." "... in order for a directed verdict to be proper, it not only must be clear that no issue of fact is involved, but the conclusions and inferences to be drawn from the fact must be undisputed as well." (Petition at 14-21)

This case especially deserves this courts'intervention because the **rules** and **the law** has been misapprehended and **grossly** misapplied; behavior which is frequently taking place in court-rooms in South Carolina and across the nation providing virtually absolute immunity for attorneys. For all the above reasons, this Court should grant The Petition for Writ of Certiorari.

Respectfully submitted,

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